In the Supreme Court of the United States

OCTOBER TERM, 1972

No. 72-2

RAY PALMER AND MAURICE ROBERT HETTICH,
PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the court of appeals is unreported (Pet. App.).

JURISDICTION

The judgment of the court of appeals was entered on March 31, 1972. A petition for rehearing was denied on May 30, 1972. The petition for a writ of certiorari was filed on June 29, 1972. The juris-

diction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether the inference contained in 18 U.S.C. 1955(c) that there is probable cause to believe that one element of an offense exists where certain other elements are shown violates petitioners' Fourth Amendment rights.

2. Whether 18 U.S.C. 1955 is an unconstitutional delegation of power to the States.

STATUTE INVOLVED

18 U.S.C. 1955 provides in pertinent part as follows:

> § 1955. Prohibition of illegal gambling businesses.
>
> (a) Whoever conducts, finances, manages, supervises, directs, or owns all or part of an illegal gambling business shall be fined not more than $20,000 or imprisoned not more than five years, or both.
>
> (b) As used in this section—
>
> (1) "illegal gambling business" means a gambling business which—
>
> (i) is a violation of the law of a State or political subdivision in which it is conducted;
>
> (ii) involves five or more persons who conduct, finance, manage, supervise, direct, or own all or part of such business; and

(iii) has been or remains in substantially continuous operation for a period in excess of thirty days or has a gross revenue of $2,000 in any single day.

(2) "gambling" includes but is not limited to pool-selling, book making, maintaining slot machines, roulette wheels or dice tables, and conducting lotteries, policy, bolita, or numbers games or selling chances therein.

(3) "State" means any State of the United States, the District of Columbia, the Commonwealth of Puerto Rico, and any territory or possession of the United States.

(c) If five or more persons conduct, finance, manage, supervise, direct, or own all or part of a gambling business and such business operates for two or more successive days, then, for the purpose of obtaining warrants for arrests, interceptions, and other searches and seizures, probable cause that the business receives gross revenues in excess of $2,000 in any single day shall be deemed to have been established.

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STATEMENT

After a jury-waived trial in the United States District Court for the Western District of Kentucky, petitioners were convicted on charges of operating an illegal gambling business in violation of 18 U.S.C. 1955. Petitioner Palmer was fined $7500 and sentenced to imprisonment for a year and a day for each of two violations, the sentences to run concurrently. He was ordered to serve six months of the sentence and was placed on three years' probation for

the balance. Petitioner Hettich was also sentenced to a year and a day for a single violation, with all but 30 days suspended. He was placed on probation for three years. The court of appeals affirmed (Pet. App. 21-24).

Petitioners were suspected of involvement in illegal gambling operations at two locations in Louisville, Kentucky, in violation of state law and of 18 U.S.C. 1955. Search warrants were obtained covering the two premises. The affidavit supporting the search at one of them recited that five or more persons were involved in the conduct of a gambling business that had been in substantially continuous operation for more than 30 days. The affidavit supporting the search of the other premises stated that five or more persons were engaged in the conduct of a gambling business there, on two successive days. With respect to the statutory element of the offense concerning the dollar volume of operations, the affidavit relied on the presumption of Section 1955(c), which provides that where the two aforementioned conditions (five or more persons on two successive days) exist, "probable cause that the business receives gross revenues in excess of $2,000 in any single day shall be deemed to have been established."

At trial, the sole defense raised involved the legality of the search and the constitutionality of the statute. Petitioners and the government stipulated that the allegations contained in the indictment were to be considered by the trial court as the evidence in the case (Pet. 6-8). Pursuant to this stipulation, all

of the elements of the offense specified in 18 U.S.C. 1955 were established.

ARGUMENT

1. Petitioners first attack the constitutionality of the presumption contained in Section 1955(c), arguing that it usurps the magistrate's function of exercising independent fact-finding judgment before issuing a search warrant. The cases relied upon in support of this argument, however, address a vice that is not present in this instance—action by law enforcement officers without an independent review of the basis therefor by a neutral and detached magistrate. See *Coolidge* v. *New Hampshire*, 403 U.S. 443, 449-453. The inference authorized by Section 1955(c), being based upon a determination by Congress following extensive hearings, does not present the risks inherent in determinations of probable cause by possibly over-zealous and biased law enforcement officials.

Thus, the issue should properly be analyzed in terms of the harmony between use of the presumption and the Fourth Amendment's requirements that searches and seizures be reasonable and be based upon a showing of probable cause. The inference being drawn under the statute is that where five or more persons conduct a gambling operation for two or more successive days, it is *probable* that gross revenues in excess of $2,000 have been received in a single day. There was a solid factual foundation for this congressionally established inference. The extensive Hearings Before the Subcommittee on Criminal Laws and

Procedures of the Senate Committee on the Judiciary, 91st Cong., 1st Sess., on S. 30 and related bills, which culminated in the Organized Crime Control Act of 1970, clearly reveal that in almost all of the cases involving raids of gambling establishments, the records seized reflected revenues of these establishments to be "better than $2,000 a day" (*id.* at 400). From this and other information and statistics available to it (see 116 Cong. Rec. 603-604), Congress reasonably concluded that a gambling operation with five or more participants doing business for two consecutive days would probably reap at least $2,000 in revenues in a single day.[1] The inference to which petitioners object thus flows rationally from the facts required to be established as a condition precedent to its invocation. Moreover, the congressional determination that probable cause is shown where application for a warrant is based upon the involvement of five or more persons in a gambling business for two or more successive days does not usurp the function of the magistrate, since he must still determine in each particular case whether the essential facts giving rise to the inference are present.

The inference contained in Section 1955(c) would, we submit, satisfy the rational connection test for use of statutory presumptions in trial of guilt or inno-

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[1] The reasonableness of the congressional findings underlying the enactment of Section 1955 has also been upheld by two other courts of appeals. *United States* v. *Harris*, No. 71-3586, C.A. 5, decided May 22, 1972; *United States* v. *Riehl*, Nos. 71-2133 - 71-2135, C.A. 3, decided May 9, 1972.

cence. See *Tot* v. *United States*, 319 U.S. 463, 467; *Turner* v. *United States*, 396 U.S. 398; *Leary* v. *United States*, 395 U.S. 6; *United States* v. *Gainey*, 380 U.S. 63; *Perez* v. *United States*, 402 U.S. 146. Since less is required to establish probable cause than to prove guilt, *Brinegar* v. *United States*, 338 U.S. 160, 173-175, it would be inappropriate to strike down a reasonable probable cause presumption that would be upheld if utilized for the purpose of establishing guilt.[2]

Petitioners argue that the presumption is impermissible because, unlike presumptions applied in a trial, it is as a practical matter irrebuttable (Pet. 16). This contention proceeds from a faulty premise regarding the nature of the probable cause inquiry (which is, of course, *ex parte*) as distinct from a trial. To prove guilt, each statutory element of the offense must be established beyond a reasonable doubt; to obtain a warrant, all that is required is a showing of probable cause, and it does not matter that it is later shown that the probability was not a reality or, indeed, even that it is shown that the information

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[2] At trial, the burden remains upon the government to establish that an illegal gambling enterprise with five or more members either has operated continuously for thirty days, or has had a gross revenue of $2,000 in a single day. The government cannot rely upon the probable cause presumption to satisfy the requirement of proof beyond a reasonable doubt. See Report of the Senate Committee on the Judiciary, S. Rep. No. 91-617, 91st Cong., 1st Sess., p. 156; and Hearings, *supra*, at 401. The statutory presumption is in terms applicable only to probable cause "for arrests, interceptions, and other searches and seizures * * *."

upon which issuance of the warrant was predicated was inaccurate. *United States* v. *Sultan*, No. 72-1114, C.A. 2, decided July 5, 1972; *United States* v. *Perry*, 380 F.2d 356, 358 (C.A. 2), certiorari denied, 389 U.S. 943. Where, as here, the inferred fact is probable given the required underlying facts, there is actual probable cause; there is therefore nothing to rebut.

2. Petitioners' contention that Section 1955 is an unconstitutional delegation of congressional power to the states is without substance. It is settled that Congress may incorporate state criminal laws in federal criminal statutes by reference. *Secretary of Agriculture* v. *Central Roig Refining Co.*, 338 U.S. 604, 616; *Currin* v. *Wallace*, 306 U.S. 1, 14; *Clark Distilling Co.* v. *Western Maryland Ry. Co.*, 242 U.S. 311, 326-327; *Kentucky Whip & Collar Co.* v. *Illinois Central R. Co.*, 299 U.S. 334, 351-352; *Nilva* v. *United States*, 212 F.2d 115, 119 (C.A. 8), certiorari denied, 348 U.S. 825. See also *United States* v. *Sharpnack*, 355 U.S. 286, upholding 18 U.S.C. 13, the Assimilative Crimes Act, which makes applicable to a federal enclave subsequently enacted criminal laws of the State in which the enclave is situated.

Moreover, the fact that a federal criminal statute is based in part upon conduct proscribed by state law does not create a violation of due process simply because of variations in the law of the several states. See, *e.g.*, *Spinelli* v. *United States*, 382 F.2d 871, 890 (C.A. 8), reversed on other grounds, 393 U.S. 410 (upholding 18 U.S.C. 1952, which prohibits traveling

in interstate commerce to promote certain illegal activity, including gambling, that violates the laws of the State in which it occurs); *Turf Center, Inc.* v. *United States*, 325 F.2d 793, 795-796 (C.A. 9); *United States* v. *Phillips*, 433 F.2d 1364 (C.A. 8), certiorari denied, 401 U.S. 917; *United States* v. *Schwartz*, 398 F.2d 464, 467 (C.A. 7), certiorari denied *sub nom. Pyne* v. *United States*, 393 U.S. 1062.[3] See, also, *United States* v. *Nardello*, 393 U.S. 286.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the petition for a writ of certiorari should be denied.

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AUGUST 1972.

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[3] This precise claim of petitioners regarding delegation of congressional authority to the states in 18 U.S.C. 1955 has also been rejected in *Schneider* v. *United States*, Nos. 71-1393, 71-1572 C.A. 8, decided April 12, 1972, and *United States* v. *Aquino*, 336 F. Supp. 737 (E.D. Mich.) In addition, the following cases have sustained 18 U.S.C. 1955 against general constitutional attacks: *United States* v. *Harris*, No. 71-3586, C.A. 5, decided May 22, 1972; *United States* v. *Riehl*, Nos. 71-2133 - 71-2135, C.A. 3, decided May 9, 1972; *United States* v. *Becker*, No. 72-1105, C.A. 2, decided May 30, 1972.

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